Supreme Court, U.S.
NO. FILED

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OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

RICHARD A. DUNCAN

PETITIONER

VS.

GEORGE BLINEBERY, RAVENNA TOWNSHIP ZONING INSPECTOR, ET AL

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

RICHARD A. DUNCAN

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37 pp

QUESTION PRESENTED FOR REVIEW

Whether the Ohio Supreme Courts decision conflicts with the Sixth Circuit Court of Appeals decision in Silver v. Franklin Twp. Bd. of Zoning Appeals 966 F 2d 1031 (6th Cir 1992) in regards to the federal question or law on the state procedure in Ohio for obtaining just compensation under the federal ripeness requirement of Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City 473 U.S. 172?

For the reasons enunciated herein, the petitioner believes the answer to such question must be yes.

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NO.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

RICHARD A. DUNCAN

Petitioner

vs.

GEORGE BLINEBERY RAVENNA TOWNSHIP ZONING INSPECTOR ETAL.

Respondents

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of the State of Ohio

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner Richard Duncan hereby petitions this honorable court for a writ of certiorari to review a judgement and opinion of the Ohio Supreme Court rendered in this cause on June 22, 1994, and respectfully shows:

OPINIONS BELOW

The Ohio Supreme Courts entry, State Of Ohio, Ex Rel. Richard Duncan vs. George Blinebery, et al. Case 94-801 is attached as Appendix A1. The Ravenna Townships Zoning Board of Appeals (Ohio) resolution (March 18, 1994) is attached as Appendix A2.

JURISDICTION OF THIS COURT

On June 22, 1994 the Ohio Supreme Court entered judgement dismissing Duncan's original mandamus action. The statute conferring on this court jurisdiction to review such judgement by writ of certiorari is 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISIONS/ORDINANCES INVOLVED

Amendment V; "nor shall private property be taken for public use without just compensation".

Ravenna Township Zoning Ordinance is setforth at Appendix A-11 (relevant part).

STATEMENT OF THE CASE

Richard Duncan (petitioner, herinafter "Duncan") owns a small lot (#231) in Ravenna Township, Portage County, Ohio, which was platted prior to zoning. Under Ravenna Township's (hereinafter "Ravenna") ordinances such lot is zoned R-H which allows single-family homes as a permitted use (see Appendix A11).

In November of 1993, Duncan applied for and was denied a building permit to build a home thereupon due to lot area and width requirements etc.. Shortly thereafter variances were applied for and denied thus leaving the lot unbuildable for any permitted residential dwelling. No court review of the variance denial was sought in State Court, (Ravenna later admitted it mistakingly thought Duncan did), as Duncan intended to file a constitutional taking without just compensation claim directly in federal court.

On April 18, 1994 Duncan filed an original complaint for mandamus in the Ohio Supreme Court (see Appendix A3-A11)(many Township officials were

named respondents). Due to that Duncan intended to file a taking without just compensation claim in Federal Court, his complaint sought to first satisfy the ripeness requirement as mandated by this Court in Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson Ci , 473 U.S. 172 (hereinafter Williamson County). Duncan drafted his complaint as complying with the ruling of Silver v. Franklin Twp. Bd. of Zoning Appeals 966 F 2d 1031 (6th Cir.1992) (hereinafter Silver v. Franklin) which indicated that a mandamus action was the proper procedure in Ohio to satisfy this ripeness requirement for obtaining just compensation (see syll. #2).

However, the respondents Ravenna motioned to dismiss with the sole argument that mandamus is not availiable as Duncan has a plain and adequate remedy at law, that being a Ohio Revised Code 2506 action (see Appendix A11-A13). Ravenna erroneously argued that Duncan did file and currently had pending a RC 2506 action. Since that time they have conceeded this was not true. Duncan oppossed the

Motion to Dismiss arguing that Silver v. Franklin contrastly and explicitly stated a mandamus action was the proper action, not a RC 2506. Furthermore, Duncan argued that a RC 2506 action wasn't an adequate remedy as the narrow purpose of the mandamus action of directing "state officials to institute eminent domain proceedings to determine just compensation" if a taking is found (as Dictated by Silver v. Franklin) could not be accomplished in the RC 2506 action (see Appendix A14-A21). Nevertheless, without issuing an opinion the Ohio Supreme Court sustained the Motion to Dismiss (Appendix A1).

REASON FOR GRANTING THE WRIT

TO DENY SUCH WRIT WOULD ALLOW A CONFLICT TO EXIST BETWEEN THE OHIO SUPREME COURT AND THE FEDERAL SIXTH CIRCUIT IN REGARDS TO THE FEDERAL QUESTION OR LAW ON THE STATE PROCEDURE IN OHIO FOR OBTAINING JUST COMPENSATION UNDER THE FEDERAL RIPENESS REQUIREMENT OF WILLIAMSON COUNTY 473 U.S. 172.

The following discussion will show that the decision of the Ohio Supreme Court herein creates a conflict and leaves all Ohio citizens on a dead end street and once again in a state of confusion. The Sixth Circuit clearly ruled to do the Williamson County 473 U.S. 172 state procedure a certain way and when Duncan attempted to do such the Ohio Supreme Court failed to implement the procedure and dismissed the case. Even if it can be implied from the Ohio Supreme Courts decision that it wants litigants to use the RC 2506 action to satisfy the Williamson County ripeness requirement, this not only still is clearly conflicting but undoubtably appears to be wholly inappropriate.

This Court in Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City 473 U.S. 172 has made it extremely clear that

"if a state provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until the owner has used the state procedure and been denied compensation" (cited in Silver v. Franklin Twp. Bd. of Zoning Appeals 966 F 2d 1031 (6th Cir. 1992) at pg. 1034).

Since Williamson County (supra) was setdown in 1985 the Ohio Federal Courts have repeadedly upheld this rule and have dismissed numerous cases for lack of subject matter jurisdiction when a litigant filing a taking claim in federal court did not first show that he used this state procedure (see Silver v. Franklin supra at page 1034 for the case citations). However, these reported decisions confusingly gave no detail or guidelines as to what constituted this state procedure.

Finally, in 1992 in Silver v. Franklin (supra), the 6th Circuit described which state procedure in Ohio constitutes satisfying this ripeness rule. In its 2nd syllabus it stated as follows;

"Ohio law provides a procedure for obtaining just compensation for a governmental taking. If a property owner can demonstrate that the enforcement of a zoning regulation results in an unconstitutional taking, the owner may seek a mandamus from a state court directing state officials to institute eminent domain proceedings to determine just compensation. See Willoughby Hills v. Corrigan 29 Ohio St 2d 39 278 N.E. 2d 658, 662 cert. denied sub nom. Chrongris v. Corrigan 409 U.S. 919."

Consequently, Duncan in reliance on Williamson County, Silver v. Franklin and Willoughby Hills (supra) interpreted these decisions to mean that he needed to first file a mandamus action in the state courts to see if compensation was forthcoming before he filed his taking claim in federal court. Therefore, Duncan fashioned his mandamus action and complaint in compliance with State, ex Rel. **Royal** v. City Of Columbus 3 Ohio St. 2d 154.

In Royal the "relief sought was an order directing appellants to institute appropriation proceedings for the purpose of compensating appellees for certain property rights allegedly taken by appellants. Thus the issue before the trial court in this cause was whether there had been a 'taking" of private property contrary to Section 19, Article I of the Ohio Constitution"
(also see State Ex Rel. v. Kauer 156 O.S. 347).

As was requested in Royal, Duncan asked for the relief of directing eminent domain proceedings if he could prove the issue of fact that a taking

had occurred" (see Appendix A8- Complaint).

Duncan filed such as an original Ohio Supreme action under the authority of State, ex rel. Pressley v. Indus. Comm., 11 Ohio St. 2d 141 (see syll. 2) and Section 2 and 6 of Article IV of the Ohio Constitution. However, the Ohio Supreme Court, without an opinion, dismissed the case (Appendix A1).

This Court needs to accept this case to clarify this obvious conflict and confusion created by the Ohio Supreme Courts decision. After 7 years of not providing guidence on the issue in its decisions, the federal courts finally in Silver v. Franklin clearly decided what constituted the ripeness state procedure in Ohio (as mandated by this Courts decision in Williamson County). When Duncan attempted to carefully and thoroughly, and thoughtfully conform with this procedure as noted above, the Ohio Supreme Court in dismissing the action has apparently (as best as Duncan can tell as no opinion was issued) attempted to shrug off its duty to implement the procedure as prescribed by Silver.

Furthermore, it can reasonably be inferred that the

Ohio Supreme Court has accepted the Respondent Ravenna's position that a RC 2506 action is the procedure that would satisfy the Williamson County ripeness requirement (again, as best as Duncan can tell as no opinion was issued by the Ohio Supreme Court and even the respondent gave little detail in its motion to dismiss) (see Appendix A11-A14). However, Duncan's Brief in Opposition set-forth why he felt this point was obviously erroneous (see Appendix A14-A 21). He setforth seven (7) reasons why an RC 2506 action was not a plain and adequate remedy and an inappropriate action. The gist of such was that an RC 2506 action could not afford the relief of directing the "state officials to institute eminent domain proceedings to determine just compensation"if a taking was found.

Consequently, this Court must clarify this conflict by ruling that 1) Silver v. Franklin has indeed prescribed the correct procedure (and that the Ohio Supreme Court erred by dismissing Duncan's case), and that 2) a RC 2506 action is wholly inappropriate in regards to satisfying the

Williamson County ripeness requirement.

CONCLUSION

The Ohio Supreme Court has made a decision conflicting with the federal law of this Court in Williamson County 473 U.S. 172 and Silver v. Franklin Twp. 966 F 2d 1031 by not entertaining Ohio's adequate procedure for seeking compensation under the ripeness doctrine. If this Court does not correct this Ohio Supreme Court ruling much confusion will result. For example the state lower courts will probably; 1) follow this precedent of Ohio's Supreme Court and refuse to entertain mandamus actions by owners who attempt to satisfy the Williamson ripeness requirement, as prescribed by Silver, and/or 2) attempt to wrongly fit such a ripeness requirement into the inept unathorized statuatory RC 2506 procedure. Furthermore, litigants confused on this ambiquity may attempt to go back to the federal courts to ask for a clarification on the matter or argue that Ohio lacks an adequate inverse condemnation law and therefore is exempted from this Williamson County ripeness requirement.

The most practical and sensible solution is for this Court to grant this writ in order to correct the conflict created by the Ohio Supreme Court and therefore to spare the federal and state courts, and the local governments and citizens a much unnecessary waste of time and money.

For the above "special and important reasons" this writ must be allowed, and is respectfully requested.

Respectfully submitted,

Richard A. Duncan

Richard A Duncan
14827 North State Ave.
Middlefield, Ohio 44062
(216)-632-1459

PRO SE

APPENDIX

ENTRY OF THE SUPREME COURT OF OHIO

(Decided June 22, 1994) Case No. 94-801

IN MANDAMUS

State of Ohio, ex rel.
Richard Duncan, Relator,

v.

George Blinebery, Zoning Inspector, et al.,
Respondents.

This cause originated in this Court on the filing of a complaint for a writ of mandamus. Upon consideration of respondents' motion for attorney fees and motion to dismiss, IT IS ORDERED by the Court that the motion for attorney fees be, and the same is hereby denied. IT IS FURTHER ORDERED by the Court that the motion to dismiss be, and the same is hereby, sustained. IT IS FURTHER ORDERED by the Court that this cause be, and the same is hereby, dismissed.

Thomas J. Moyer-Chief
Justice

RESOLUTION 94-BZA-01 (RICHARD A. DUNCAN)

WHEREAS, the Ravenna Township Board of Zoning Appeals met on Tuesday, March 8, 1994, at the Brown Middle School (Note 3 paragraphs omitted as immaterial), WHERAS, the applicant appeared before the Board requesting a variance for property located at third lot north of Skeels (west side of Freedom), Ravenna Township lot #231, Ravenna Building Companies Allotment, to build a single-family home. WHEREAS, the applicant having presented his request to the Board and answered their questions regarding this request and the adjoining property owners in attendance given full oppurtunity to address their concerns; BE AND IT IS HEREBY RESOLVED, the Board having duly considered the request, by a vote of 3-0 denied the variance requests. THE ABOVE AND FOREGOING IS HEREBY JOURNALIZED AND ENTERED UPON THE RECORD THIS 18th DAY OF MARCH, 1994.

JAMES DIPAOLA, CHAIRMAN

COMPLAINT FOR WRIT OF MANDAMUS

STATE OF OHIO, ex.rel.
RICHARD DUNCAN
14827 North State Ave.
Middlefield, Ohio 44062

Plaintiff-Relator

vs.

GEORGE BLINEBERY
ZONING INSPECTOR
6115 S. Spring Street
Ravenna, Ohio 44266

JIM DIPAOLA
ZONING BOARD OF APPEALS
CHAIRMAN
6115 S. Spring Street
Ravenna, Ohio 44266

ROBERT CHERRY (TRUSTEE)
RAVENNA TOWNSHIP
6115 S. Spring Street
Ravenna, Ohio 44266
(TRUSTEE JENNINGS AND HAIRSTON)

Defendant-Respondents

CASE NO.
94-801

COMPLAINT FOR
WRIT OF
MANDAMUS

1. Plaintiff-Relator Richard Duncan is a citizen of the State of Ohio (hereinafter "Duncan").

2. Defendant-Respondent Robert Cherry is a trustee of Ravenna Township (Portage County) which is a township government established and existing under the laws of the State of Ohio. George

Blinebery is the zoning inspector and Jim DiPaola is the chairman of the zoning board of appeals of Ravenna Township (Also, Trustees are Mr. Jennings and Mr. Hairston).

3. Duncan is the owner of Lot #231 in the Ravenna Building Company's Allotment in large lot 17-64 which fronts on Freedom Street. Such vacant lot has 31 feet of frontage and has a depth of 120 feet and thus has about .09 acres of land.

4. Most of the lots in the immediate area of Duncan's lot are of similar size to his and many have residential dwellings upon them. Some non-residential land uses also exist in the vicinity.

5. Ravenna Twp. has adopted a zoning ordinance which it applies and enforces on Duncan's property and it zones such a R-H High Density Residential District and within such zone duplexes and single-family residences are permitted uses (multi-family dwellings abutting a commercial district, accessory buildings incidental to the principle use and signs are also permitted uses). (see Exhibit A attached).

6. In November of 1993, Duncan talked to the previous zoning inspector (Mr. Davis) about proposing a

duplex on his lot and the zoning inspector told him not to apply for a zoning permit but that he needed to apply for variances due to the lots inability to comply with the zoning requirements.

7. On December 14, 1993 Duncan appeared before the zoning board of appeals and the board denied the requested variances for such a duplex.

8. At the direction of the Board Chairman DiPaola, on March 8, 1994 Duncan appeared before the Zoning Board for variances to build a single-family residence on such lot and such was also denied.

9. As a result of the above stated variance denials and permit denials no type of residential dwellings or usuage is allowed on Duncan's lot (when other similar lots have dwellings thereupon).

10. On March 9, 1994 Duncan sent a certified letter to the zoning inspector (with copies to other Ravenna Township officials) requesting if there were other procedures availiable under the ordinances which would allow Duncan to build a single-family unit on his property. The Township attorney at a meeting with Duncan on April 7, 1994 responded in the negative.

11. On March 14, 1994 Duncan delivered a letter by personal service to the Township Attorney asking him if the Township government would initiate condemnation proceedings. The Township attorney at a meeting with Duncan on April 7, 1994 responded in the negative.

12. The government actions of the defendant-respondents (Ravenna Township, and through its elected and appointed officials and acting in their respective capacities), that of;

-the adoption of and application and enforcement of said ordinance provision R-H zoning to Duncan's property; and/or its

-refusing to relieve Duncan from or remove the existing R-H zoning in the form of variances etc. (or to issue a zoning certificate); and or its

-refusing to initiate condemnation proceedings in which to compensate him,

constitute the implementation and execution of unconstitutional policies, ordinances, regulations and decisions.

13. More specifically, such governmental actions of defendant-respondents, or such acts (as applied) deprive Duncan of the rights, privileges and immunities secured to him by the laws and constitutions of Ohio and the United States and particularly his right not to be deprived of property without due

process of law, and his right to the equal protection of the law, and his right that no property shall be taken for public use without just compensation (the legitimate state interests are not substantially advanced (or similarly stated) and/or Duncan is denied all economically viable use of such property (or similarly stated, reasonably adaptable or beneficial use)).

14. Duncan alleges that as a direct and proximate result of the unlawful action of the defendant-respondants (the above cited acts complained herein) Duncan for a period of time in which the ordinances are in effect has been deprived of the right to;

1) the oppurtunity to develop his property as he had a lawful right to do so and as he intended, and to;
2) use his property in a lawful manner as a dwelling(s),

and furthermore, such acts have caused Duncan to sustain;

3) increased financial costs for development and improvement, and;
4) lost business profits and lost business oppurtunities, and
5) increased legal, engineering, professional and other out of pocket costs and expenses;

therefore, causing him to sustain severe and substantial damages in the amount commensurate with that amount as will be proven at trial.

15. It is law that prior to filing a taking without just compensation claim in Federal Court (as Duncan intends to do) Duncan is involuntarily forced by the doctrine of ripeness to first establish that compensation is not forthcoming from the state government (Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City 473 U.S. 172). The Sixth Circuit case of Silver v. Franklin Twp. Bd. of Zoning Appeals 966 F 2d 1031 (6th Cir. 1992) at syll. 2 stated; "Ohio law provides procedure for obtaining just compensation for governmental taking; if property owner can demonstrate that enforcement of zoning regulation results in unconstitutional taking, owner may seek mandamus from state court directing state officials to institute eminent domain proceedings to determine just compensation".

16. Wherefore, Duncan respectfully requests;

-an order allowing the issuance of a mandamus to state officials directing them to institute eminent domain proceedings to determine just compensation if Duncan demonstrates that the enforcement of the zoning regulation results in an unconstitutional taking (alternative and/or peremptory),

- the oppurtunity (trial or hearing) to prove the alleged taking has occurred,

-interests and costs of this action,

-such other relief as the Court deems just and equitable.

17. Furthermore, Duncan respectfully requests to reserve in these state court proceedings an intent to bring all of his federal claims in federal court (all those which needn't be heard to comply with the ripeness rule herein), (see Fields v. Sarasota Manatee Airport Authority 953 F 2d 1299). Duncan informs this court that his major federal claims involve the issue ofwhether there is a taking, and/or whether the compensation (if any) tendered by the state is "just", and/or whether there is a due process violation, and/or whether there is an equal protection violation and other issues, such as damages.

18. Furthermore, Duncan respectfully requests, in the event this Court finds it is not proper to preserve any issues for federal court as mentioned above (though Duncan strongly objects to) that this Court;

-allow Duncan to amend his complaint accordingly,

-issue an order declaring Ravenna Township's R-H (and any other ordinances) unconstitutional as

applied as a taking of property without just compensation, and a violation of the due process and equal protection clauses.

- issue an order enjoining Ravenna Twp.., its officers, agents, servants, employees and attorneys and all persons in active concert or participation with them, from enforcing said ordinance as it applies to the prohibition of the utilization of dwellings on the premises.

-issue an order directing Ravenna Twp. to issue a building permit in accordance with Duncan's building plans,
-issue an order awarding compensatory damages against the defendants in a sum as commensurate with that as proven at trial.

Respectfully submitted,

_____

Richard A. Duncan
14827 North State Ave.
Middlefield, Ohio 44062

JURY DEMAND

The Plaintiff herein demands a trial by jury as to all the issues herein.

_____

Richard A. Duncan

PRAECIPE

CLERK- Please issue a service of summons on the defendant-respondents.

_____

Richard Duncan

ORAL ARGUMENT

The Plaintiff herein respectfully requests an oral argument.

_____

Richard A. Duncan

STATE OF OHIO)
COUNTY OF GEAUGA)

AFFIDAVIT

Richard Duncan being first duly sworn, says that he is the Plaintiff-Relator in the above entitled action, that he has read the foregoing Complaint and that the statements and averments therein contained are true as he verily believes.

_____

(notarization omitted) Richard Duncan

EXHIBIT A

R-H HIGH DENSITY RESIDENTIAL DISTRICT

Section 730 PURPOSE

This district is established to accomodate development at densities of up to 8 dwelling units/acre in built up areas or in close proximity where central sewer and water are availiable and where other amenities are availiable or can be availiable at the time of construction. This district is also intended to provide for a variety of housing types to meet the housing needs of the community.

Section 731.1 USES

A. Permitted Uses

1. Single family dwellings.
2. Two family dwellings.
3. Multi-family dwellings where the dwellings front/or abuts a commercial type district.
4. Accessory buildings incidental to the principal use.
5. Signs as regulated by Chapter 12.

B. Conditionally Permitted Uses

(omitted as not relevant)

BRIEF IN SUPPORT OF RAVENNA TOWNSHIPS' MOTION TO DISMISS

Note; pages 1 and 2 omitted as not material as contains a statement of facts and general mandamus law.

Page 3 (verbatim)

also, Speakman v. Dept. Of Rehabilitation and Correction (1987), 36 Ohio App. 36; State, ex rel Wolfe, v. Loraine County Board of Elections (1978), 59 Ohio App. 2d 257.

Relator's petition is essentially seeking the same relief as that availiable upon appeal and is clearly offered as a substitute for an appeal. Therefore, Relator fails to demonstrate that no adequate remedy is availiable at law. Drake, supra.

When an appeal from a judgement is permitted, a writ can not be used as a substituted for that appeal. State ex rel. Hastings Mutual Insurance Co. v. Merillat (1990), 50 Ohio St. 3d 152. R.C. 2506 is the obvious vehicle for the appeal of this matter to the Court of Common Pleas, in Portage County. In the instant matter, Relator has already exercised his right of appeal to the local Court of Common Pleas. He has filed a Notice of Appeal in Portage County Common Pleas Case No. 94 CV 0206. Appendix A. Appellate review of a judgement constitutes an adequate remedy. State, ex rel. Pressley, v. Industrial Comm.(1967), 11 Ohio St. 2d 141. Thus, Relator can not seek a Writ of Mandamus as an alternative to or in conjunction with that appeal, and such writ must be dismissed pursuant to Civ. R. 12 (B) (6). State, ex rel. Sibarco Corp. v. City of Berea (1966), 7 Ohio St. 2d 85; see also, State of Ohio ex rel. Cundiff. v. Portage County Bd. of

Elections. (1994), Portage County App. No. 94-P-0023, unreported. Appendix B.

Page 4 (verbatim)

(B) Conclusion

To prevail on a Writ of Mandamus, Relator must show that he does not have a plain and adequate remedy at law. State, ex rel. Harris, supra. In the case sub judice, Relator is well aware that an administrative appeal pursuant to R.C. 2506 is availiable. Such a Notice of Appeal has, in fact, been filed, with the Portage County Common Pleas Court Case No. 94 CV 0206. Appendix A. Accordingly, this matter must be dismissed as it fails to state a claim upon which relief may be granted. Civ. R. 12.

Wherefore, Respondents requests that this Court deny the Writ for failure to state a claim upon which relief may be granted. Relator has an adequate remedy at law, a R.C. 2506 appeal, which he has already utilized. Appendix A.

Respectfully submitted,

DAVID W. NORRIS
Portage County Prosecuting Attorney

Denise Smith- Assisstant

RELATORS BRIEF IN OPPOSITION TO MOTION TO DISMISS AND MOTION FOR ATTORNEY FEES

Note; pages 1 and 2 omitted as not material as contains statement of the case and a minor argument. (footnote).

The central issue of this Motion to Dismiss involves the questions as to whether a RC 2506 action should have been the action that Duncan filed instead of a mandamus action and particularily whether such is a plain and adequate remedy (the fact that he didn't timely do this is irrelevant as he could have). For the following (4) four reasons it is clear that a RC 2506 filing would have been improper and inappropriate.

1. RC 2506 Is Not Plain and Adequate

First of all, the RC 2506 remedy does not meet the legal requirements of being "plain and adequate", as the points below will indicate. Duncan will refer to the relevant law on this point which is setforth at 67 O. Jur 3d Section 30 at page 240 entitled "Requirement that other remedy be "plain and adequate" generally".

Note; Duncan's rebuttel on pages 1 and 2 that he did not have filed or pending a RC 2506 action is omitted as Ravenna has since admitted it's mistake.

Point 1- The RC 2506 action is not adequate as "determined by a consideration of the purposes to be accomplished based on the facts involved" (p. 240 citing Trusz v. Middleburg Hts. 112 O App. 87). Duncans instant mandamus action has as its narrow purpose to direct"the state officials to institute eminent domain proceedings to determine just compensation" if a taking is found(see Complaint, p. 16 citing Silver v. Franklin Twp. Bd of Zoning Appeals). This Silver case has specifically ruled that a mandamus proceeding (as Duncan has filed) is the proper way to decide whether the State is willing to provide any compensation if a taking is found to have occurred, thus satisfying this ripeness rule of Williamson County (Note; in Silver the plaintiff did not resort to State procedures for obtaining just compensation .... so the 6th Circuit ruled his taking claim was not ripe for federal court review).

Contrastly, a RC 2506 action's purpose is broader in scope and generally seeks to review the propriety of administrative decisions based on the evidence before it, and/or to attack the merits of constitutional claims. RC 2506 as paraphrased states the "Court may find that the order or decision is unconstitutional arbitrary or unsupported

by the evidence|.... and may affirm or reverse the order or decision... etc." The usual relief given on a successful appeal is limited to the enjoinment of the zoning ordinance or posssibly the ordering of the issuance of a zoning permit. Consequently, the purposes of each action are very different.

While Duncan could have sought a R.C. 2506 review or appeal, the existence of such "will not preclude him from resorting to mandamus where such remedy by review is not of that character" (see 67 O. Jur. 3d at Section 37 page256 citing State ex rel Wright v. Cohen 174 OS 47). Furthermore, while some issues of fact that may be tried within each action may be overlapping this nevertheless is irrelevant.

Point 2- The RC 2506 is not adequate as it does not "afford relief with reference to the matter in controversy", and is inappropriate "to the particular circumstances of the case" (p. 241 citing Brissel v. State 87 O S 154). As noted above in point 1 the relief sought as stated in Silver 966 F 2d 1031 (6th Cir. 1992) of directing state officials to institute eminent domain proceedings is not allowable in a RC 2506 action (see Complaint p. 15). The relief as provided in a RC 2506 action of enjoinment of the zoning ordinance

is inappropriate to Duncan's particular circumstances of determining just compensation.

Point 3- The RC 2506 action is not adequate as it is not "availiable and effective as well as full and complete" (p. 241 citing Hudson v. Kelly 55 O App. 314). As noted above, while the RC 2506 action may ultimately give Duncan a zoning permit or enjoin the zoning ordinance it would not effectively, fully and completely decide whether "compensation is not forthcoming from the state government" under the ripeness doctrine of Williamson (see Complaint p. 15).

Point 4- The RC 2506 action is not adequate as it does not "secure absolutely, and of right, to the injured complaining party, relief from the wrong done" (p. 243 citing Merydith Const. Co v. Dean 95 OS 108). If Duncan can prove a unconstitutional taking has occurred on Lot 231 in this mandamus action than just compensation as given by a jury under RC 163 will be determined. However, within the RC 2506 action, it is obvious that just compensation can not be given from the taking wrong. It has specifically been held that RC 2506.01 does not empower state courts to award damages for injuries suffered (Negin v. City of Mentor 601 F Supp 1502 (N.D.).

Point 5- An RC 2506 action is not adequate as it does not "actually give relief in the nature obtainable in mandamus" (p. 243 citing Robertson v. Bd of Educ. 27 OS 96) (Note; see arguments above).

Point 6- The RC 2506 action is not adequate as in this situation "when a suit in mandamus seeks to require a public officer to preform the duty imposed upon him by law, the relator has no adequate remedy at law, unless a legal remedy other than mandamus will compel the officer to preform, in effect, the specific act which the law enjoins" (p. 243 citing Merydith Const. Co v. Dean 95 OS 108). Duncan is not aware that a court in a RC 2506 action can compel an officer to specifically act to preform eminent domain proceedings if a taking is found to exist on Duncan's lot. As noted above, this is what Duncan seeks to require in this present mandamus suit.

Point 7- An RC 2506 action is not adequate after applying the test and "taking into consideration the nature of the act required, and whether the benefits to be derived by the preformance of the act will be destroyed by delay, or otherwise impaired, when relief is sought by other legal or equitable remedies" (p. 244

citing Trusz v. Middleburg Heights 112 O App 87). Certainly, the act Duncan seeks herein of compeling the officials to preform eminent domain proceedings will be destroyed and impaired if a RC 2506 action was resorted to as this is not allowable therein. Ultimately, on the merits of Duncan's ensuing taking without just compensation claim in Federal Court (see Complaint p. 17 where he reserved this for Federal Court), it is imperative that the court will need to know how much compensation the state intends to provide Duncan (see McDonald, Sommer and Frates v. County of Yolo 477 U.S. 340 at 350 where the U.S. Supreme Court stated "a court cannot determine if a state has failed to provide just compensation until it knows what compensation the state intends to provide").

In conclusion, as was shown in the 7 foregoing points the purposes of, the relief sought within, the fullness and completeness of and the benefits to be derived from each of the remedies under consideration are vastly different. Consequently, for the foregoing reasons, it is clear that the RC 2506 action is not adequate as it is not suitable, proportionate or suf-

ficient (Fisher v. Damm 36 O App 515) to entertain Duncan's instant mandamus action which narrowly seeks to resort to state procedures for obtaining just compensation. Therefore, it has no effect of barring this writ.

2. Silver v. Franklin Twp. Specifically Directs A Mandamus Be Filed

Secondly, it is clear that a RC 2506 filing would be improper as setforth by the case of Silver v. Franklin Twp.(supra) which specifically states that this ripeness requirement must be pursued in a mandamus action (also see the case of State ex rel. Royal v. City of Columbus 3 Ohio St. 2d 154 and State ex rel. Partlow v. Columbus (1970) 22 Ohio St. 2d 1 where mandamus was used to obtain compensation).

3. RC 2506 Has No Jurisdiction To Hear This Case

Thirdly, it is clear that a RC 2506 filing would be improper as no where in the direct legislatively adopted language of statute RC 2506 or in the courts interpretation of it in the case law does it authorize that it has jurisdiction of this ripeness requirement or to obtain compensation.
Note; reason 4 and the attorney fee arguments are omitted as not material and relevant.

IV CONCLUSION

As was shown herein, an R.C. 2506 action is not a plain and adequate remedy to preclude the issuance of a mandamus in this case as it simply could not compel the Ravenna Township officials to preform the duty of initiating eminent domain proceedings if Duncan can prove a taking has occurred. Furthermore, the case law and statutes specifically support that this case was properly filed herein and that a RC 2506 filing would be improper (as contrary to Silver and probably contrary to the courts subject matter jurisdiction).

(omitted ..... on attorney fees).

Therefore, based on the above points Duncan repectfully requests that both motions be denied.

Respectfully submitted and requested,

Richard A. Duncan
14827 North State Ave.
Middlefield, Ohio 44062
Relator

SERVICE (omitted)
AFFIDAVIT (omitted as on attorney fee points)

Supreme Court, U.S.
FILED
OCT 12 1994
OFFICE OF THE CLERK

IN THE UNITED STATES SUPREME COURT
OCTOBER TERM, 1994

RICHARD A. DUNCAN	)	CASE NO. 94 335
	)	
Petitioner,	)	
	)	
vs.	)	
	)	
GEORGE BLINEBERRRY, et al.	)	
	)	
Respondents.	)	

RESPONDENT'S BRIEF
IN OPPOSITION TO PLAINTIFF'S
PETITION FOR CERTIORARI

RICHARD A. DUNCAN
14827 North State Ave.
Middlefield, Ohio 44062
Petitioner, Pro Se

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I. STATEMENT OF THE CASE

Statement of Facts:

Relator, Richard Duncan, purchased Lot No. 231 in Ravenna Township, Portage County, Ohio. The transaction was via a Sheriff's sale due to delinquent taxes. All pertinent zoning resolutions as to area requirements were in effect as of the date of the purchase.

On November 30, 1993, Relator applied for four (4) variances with respect to area requirements. Relator requested that a duplex be built on the vacant land. The lot being only 31 feet in width did not meet the zoning requirements of the Ravenna Township Zoning Resolutions as to sidelots and setback allowances. The hearing on this variance request was set for December 14, 1993.

Prior to that hearing, Relator filed a second application on the same property. In this application, Relator again requested variances with respect to area requirements, in order to construct a single family residence. This hearing was originally set for January 11, 1994. The matter was reset and heard on March 8, 1994.

At the hearings set for December 14, 1993, and March 8, 1994, the respective applications were denied.

Procedural Posture

Relator applied for area variances for a 31 foot vacant lot purchased at a Sheriff's Sale. Applications were filed for a duplex and a single family dwelling on November 30 and December 8, 1993, respectively. The second application was filed prior to any

hearing on the first. The initial application was denied on December 14, 1993, and March 8, 1994, the second request was denied. Relator has never made a proper appeal to the Common Pleas Court of the Ravenna Township Board of Zoning Appeals' decisions. Instead, Relator has filed a Mandamus action in the Ohio Supreme Court. That original action was dismissed, and Relator has failed to file any inverse condemnation proceedings in the Portage County Common Pleas Court and any other State court.

II. LAW AND ARGUMENT

The facts alleged by Plaintiff do not give rise to a claim under the Fifth and Fourteenth amendments of the U.S. Constitution. It is axiomatic that a government entity "may execute laws or programs that adversely affect recognized economic values". Penn Central Transportation Co. v City of New York (1978), 57 L.Ed. 2d 631, 638. Hence, assuming there has been a taking for purposes of this motion only, it is only when there is a failure to compensate a landowner that a violation occurs.

The United States Supreme Court has held that a federal taking claim is not yet ripe for adjudication until state remedies have been expended. Williamson County Regional Planning Commission v Hamilton Bank (1985), 87 L. Ed. 2d. 126

> " A second reason the taking claim is not yet ripe is that respondent did not seek compensation through the procedures the state has provided for doing so. The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation. * * * Nor does the Fifth Amendment require that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a 'reasonable, certain, and adequate provision for obtaining compensation' exist at the time of the taking." Citations omitted. Id. at 143-144.

A property owner can not claim a violation in federal court for a taking without just compensation, until it has used the state procedures for inverse condemnation, and been denied such compensation. Id. The Court reasoned that the state's action or "taking" was not complete until compensation had been denied.

Plaintiff in the case at bar has not availed himself of state

procedures, nor are those procedures inadequate. Until those state remedies are fully utilized, a taking claim is premature and must be dismissed. Id. at 145. Accordingly, Respondent respectfully requests that this Court deny Plaintiff's petition for certiorari.

III. CONCLUSION

For the above stated reasons, Portage County Solid Waste District's motion to dismiss should be granted as the Court has no subject matter jurisdiction over the action, and Plaintiffs have failed to state a claim upon which relief can be granted.

Respectfully submitted,

VICTOR V. VIGLUICCI
PORTAGE COUNTY PROSECUTING ATTORNEY

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Ravenna, Ohio 44266
(216) 297-3850

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the within Motion to Dismiss has been sent by regular U.S. mail to Richard A. Duncan, 14827 North State Ave., Middlefield, Ohio 44062 this 12 day of October, 1994.

Denise L. Smith

DENISE L. SMITH, Ohio Reg. #0017811
Chief Assistant Prosecuting Attorney